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DRUG TESTING

Management Problems and Legal Challenges Facing DOT's Industry Programs

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The Honorable Glenn M. Anderson
Chairman, Subcommittee on Investigations
and Oversight
Committee on Public Works and Transportation
House of Representatives

Dear Mr. Chairman:

In response to your request and subsequent discussions with your office, we examined the approach that the Department of Transportation used to implement its transportation industry drug-testing program. This report presents our findings, conclusions, and recommendations concerning our review of this program.

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to interested congressional committees; the Secretary of Transportation; the Administrators of the Federal Aviation Administration, Federal Railroad Administration, Federal Highway Administration, Research and Special Programs Administration, and Urban Mass Transportation Administration; and the Commandant of the United States Coast Guard.

This work was performed under the direction of Kenneth M. Mead, Director, Transportation Issues (202) 275-1000. Other major contributors are listed in appendix II.

Sincerely yours,

J. Dexter Peach
Assistant Comptroller General

Executive Summary

Purpose

Concerned about drug use in the transportation industry, the Department of Transportation (DOT) beginning in 1989 is requiring about 221,000 employers to test 4 million private-sector transportation workers in safety-sensitive and, in some cases, security-related positions for illegal drug use. The DOT administrations estimated that employers would spend about $2.1 billion to conduct drug tests over a 10-year period but that reduced drug use would result in fewer accidents and improved productivity, saving society about $8.7 billion.

As congressionally requested, GAO (1) determined the status of DOT's private-sector drug-testing programs, (2) evaluated DOT's program implementation, (3) described the present legal challenges to DOT's regulations, and (4) analyzed congressional bills proposing drug testing for certain private-sector transportation industry workers, comparing the bills' provisions with DOT's drug-testing regulations.

Background

With the goal of a drug-free transportation workplace, DOT drug-testing programs require transportation workers to receive preemployment, periodic, reasonable cause, postaccident, random, and return-to-duty drug tests. Individual programs are being implemented by the six DOT administrations that are responsible for the air, rail, highway, maritime, mass transit, and pipeline industries, respectively. The drug-testing programs require that 50 percent of the 4 million covered transportation workers be randomly tested annually for 5 illegal drugs—amphetamines, marijuana, cocaine, opiates, and phencyclidine.

Results in Brief

The six administrations initially required employers with more than 50 covered employees to begin drug testing by the end of 1989 and other employers, a year or more later. However, the three administrations responsible for the rail, maritime, and pipeline industries extended employer implementation dates from 1 to 4 months to allow additional time for legal challenges and program development.

The Office of the Secretary played an active role in overseeing the development of each administration's regulations because it wanted consistent drug testing across the transportation industry. The administrations perform the same types of tests and require the same testing procedures. However, the implementation approaches and plans for program management vary across the administrations.

For example, the approaches of only two of the six administrations—the Federal Railroad Administration and the Federal Aviation Administration—contain management practices, such as monitoring of employer drug-testing programs and procedures, that GAO believes are important for effective program implementation and management. Also, the Office of the Secretary has not provided guidance to the administrations on the types of information needed from employers to evaluate the programs' overall effectiveness.

Employee unions and associations have challenged the legality of DOT's regulations, including the constitutionality of random drug testing. The resolution of these cases may take some time. The 101st Congress is considering two bills that differ from DOT's programs by also requiring, among other things, random testing for alcohol abuse, which is not required by the DOT drug-testing programs. Also, proposed employer penalties for noncompliance may not be clear because each administration is basing penalties on its enabling safety legislation rather than specifically providing a penalty schedule.

Principal Findings

Status of Program Implementation

At the time of GAO's review, the DOT administrations were proceeding with development of their drug-testing programs in anticipation of actual testing. The drug-testing regulations originally required transportation employers to begin drug testing by the end of 1989. However, three of the six administrations had slipped their implementation dates from 1 to 4 months. For example, to respond to petitions filed by pipeline industry representatives, the Research and Special Programs Administration extended the date that drug testing was to begin for pipeline companies with more than 50 covered employees from December 20, 1989, to April 20, 1990.

Office of the Secretary Guidance Essential for Effective Program Implementation

Because of the size, cost, and complexity of DOT's private-sector drug-testing program, GAO believes a focal point in the Office of the Secretary is necessary to provide the six administrations with guidance and direction in implementing, managing, and evaluating their drug-testing programs. GAO found that the DOT administrations' drug-testing programs, while covering similar types of safety-sensitive employees, do not, in all

all cases, include management practices that GAO identified as needed to enhance policy and program effectiveness. These practices are

- providing comprehensive guidance to employers to ensure that employers have needed information to develop and implement an effective drug-testing program,
- submission by employers of drug-testing plans for review and approval to ensure that the planned programs comply with the regulations, and
- monitoring of employer drug-testing programs and procedures to ensure that employers are complying with the drug-testing regulations.

Federal Aviation Administration and Federal Railroad Administration implementation approaches include each of these management practices. However, the United States Coast Guard approach does not include any of these practices. The Federal Highway Administration plans to monitor employer compliance but has provided limited guidance to employers and does not plan to review employer drug-testing plans. The Research and Special Programs Administration and the Urban Mass Transportation Administration provided employer guidance and plan to monitor employer compliance but do not plan to review employers' drug-testing plans.

The Office of the Secretary has also not provided the administrations with guidance on what program information to gather from employers in order to evaluate the overall success of the program and progress in achieving a drug-free transportation workplace. Such an evaluation should include (1) periodic employer reporting of drug test results and program costs and (2) sound evaluation criteria and methods to properly evaluate program effectiveness on an industry-wide basis.

Legal Challenges

At the time of GAO's review, union and employee association challenges to DOT's private-sector drug-testing regulations had been consolidated. The arguments used by the petitioners in these cases ranged from the constitutionality of random drug testing to DOT's basic statutory authority to mandate private-sector employee drug testing. Only one of these cases had been ruled upon by the end of GAO's review, but petitioners have appealed.

Proposed Legislation

The 101st Congress is considering two bills requiring drug testing for certain private-sector transportation workers. Key differences exist between the House and Senate bills and between those bills and DOT's

drug-testing regulations. For example, the House and Senate bills would require testing for alcohol abuse; but DOT's regulations do not, except that the Federal Railroad Administration and the United States Coast Guard test for alcohol after certain types of accidents. After issuing its final drug-testing regulations, the Secretary announced that DOT was beginning to consider the need for additional alcohol-testing regulations.

Another difference involves the penalties to be imposed against employers who fail to comply with the regulations. The House bill includes specific civil and criminal penalties. FRA is the only administration that specified in its drug-testing regulations the penalties to be imposed on employers for noncompliance. Because of the importance of the drug-testing program, merit exists for having each administration publish a specific penalty schedule for employers who do not comply with the drug-testing regulations.

Recommendations

GAO recommends that the Secretary of Transportation establish a focal point in the Office of the Secretary to (1) work with the administrations to incorporate effective management practices, including the practices GAO identified, in their implementation approaches to ensure that employers are complying with drug-testing regulations and (2) adopt evaluation criteria and provide the administrations with guidance on the types of program information they should be gathering from employers to evaluate program success.

GAO is also recommending that the Secretary require each administration to publish a specific penalty schedule for employers who do not comply with the drug-testing regulations.

Agency Comments

GAO obtained and incorporated the views of responsible DOT and administration officials on the factual information presented. These officials generally agreed with the facts as presented. They also provided their views on our observations, which are reflected in the report where appropriate. However, as directed by the requester, GAO did not obtain official comments on a draft of this report.

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Abbreviations

DOT	Department of Transportation
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
GAO	General Accounting Office
OST	Office of the Secretary of Transportation
PCP	phencyclidine
RSPA	Research and Special Programs Administration
UMTA	Urban Mass Transportation Administration
USCG	United States Coast Guard

Introduction

Since it was established in 1967, the Department of Transportation (DOT) has played a vital role in the nation's efforts to provide for the safe and efficient movement of people and goods in the $800 billion-a-year transportation industry. DOT manages over 100 programs with an estimated annual budget of about $27 billion and has almost 100,000 employees.

Fearing that society's drug abuse problem has infiltrated America's transportation industry and could adversely affect the safety of the public and transportation workers, DOT has issued regulations mandating drug testing for about 4 million private-sector transportation workers. The goal of DOT's drug-testing program is to have a drug-free workplace in the transportation industry. The DOT administrations also considered including alcohol testing in this program to deal with the problem of alcohol abuse and asked for comments as part of their drug-testing rulemakings. The DOT administrations decided not to require alcohol testing as part of their drug-testing regulations. The Secretary, DOT has recently initiated a separate study looking at the need for alcohol testing.

The industry drug-testing programs are modeled after DOT's internal federal civilian employee drug-testing program, which was implemented in June 1987. Under DOT's internal drug-testing program, employees are subject to testing when an employee's behavior indicates reasonable suspicion of drug usage, an accident has occurred, or when unsafe practices have been observed. In addition, safety-sensitive and security-related positions are also covered by random testing. These include about 32,000 employee positions, such as air traffic controllers, railroad safety inspectors, and motor carrier safety inspectors.

Although DOT is a decentralized organization, the Office of the Secretary of Transportation (OST) provides policy direction, coordination, and program review throughout the department. To attain its goal of a drug-free transportation workplace, the Secretary of Transportation, in January 1988, announced that six administrations—Federal Aviation Administration (FAA), Federal Railroad Administration (FRA), Federal Highway Administration (FHWA), United States Coast Guard (USCG), Urban Mass Transportation Administration (UMTA), and Research and Special Programs Administration (RSPA)—responsible for aviation, railroad, motor carrier, maritime, mass transit, and pipeline industries, respectively, would issue regulations requiring drug-testing programs for industry employees considered to be in safety-sensitive and security-

related positions. Table 1.1 lists the administrations requiring drug-testing and certain aspects of their safety-sensitive and security-related responsibilities.

Table 1.1: Examples of Safety-Sensitive and Security-Related Responsibilities of DOT Administrations

DOT administration	Selected safety-sensitive and security-related responsibilities
Federal Aviation Administration (FAA)	Regulates aviation safety, including issuing commercial and private pilot certificates and prescribing rules and regulations relating to operation and maintenance of aircraft.
Federal Highway Administration (FHWA)	Regulates the motor carrier industry, including licensing of commercial truck and bus drivers, and prescribes overall safety requirements for the motor carrier industry.
Federal Railroad Administration (FRA)	Regulates the safety of the nation's railroads, including inspection of their operations, and will begin licensing railroad operators under recent legislative authority.
Research and Special Programs Administration (RSPA)	Regulates the safe transportation of natural gas, petroleum, and hazardous materials.
Urban Mass Transportation Administration (UMTA)	Provides financial assistance to local transit authorities who hire operators in safety-sensitive positions.
United States Coast Guard (USCG)	Regulates marine safety by issuing licenses, certificates of registry, and marine documents to crews of commercial merchant marine vessels.

Source: OST and DOT administrations' drug-testing regulations.

Background on DOT's Drug-Testing Programs

Each administration's regulation requires transportation workers in safety-sensitive positions to be tested. These positions consist of various occupations including vehicle operators, such as airline pilots, train engineers, truck and bus drivers, and ship captains. The regulations generally require six types of drug testing for five illegal drugs—amphetamines, marijuana, cocaine, opiate, and phencyclidine (PCP): preemployment, periodic, reasonable cause, postaccident, random, and return-to-duty or follow-up testing. The six administrations' regulations require that if employees test positive and this cannot be attributed to approved medicinal use, they must be taken out of the positions they occupy. Such employees may be fired, rehabilitated, or placed in a noncovered position. Table 1.2 shows the estimated number of industry employers and employees who will be subject to testing programs.

Table 1.2: Estimated Number of Employers and Employees Subject to the Drug-Testing Programs

Administration	Number of employers	Number of employees
FAA	4,300	538,000
FHWA	200,000	3,000,000
FRA	500	90,000
RSPA	2,140	116,500
UMTA	1,600	195,500
USCG	12,000	120,000
Total	**220,540**	**4,060,000**

Source: OST and administrations' program managers

Testing Procedures

The six DOT administrations issued regulations containing drug-testing procedures for industry-wide use. DOT modeled these regulations after the Health and Human Services' drug-testing guidelines[1] to ensure that employee privacy and dignity is maintained. These mandatory guidelines, which were developed for use by all federal agencies, contain the specimen collection procedures, guidance on proper laboratory analyses procedures, requirements for reporting test results to a medical review officer, and qualifications and responsibilities of the medical review officer. DOT modified the Health and Human Services guidelines for use in drug-testing programs for DOT-related industries. For example, the Health and Human Services guidelines do not permit testing laboratories to subcontract their testing work, whereas the DOT procedures permit subcontracting under carefully controlled conditions. These conditions include that a subcontractor laboratory must be certified by Health and Human Services and must be responsible for the complete processing of the sample.

Economic Evaluations

DOT justified the private-sector drug-testing program primarily on the basis of ensuring the public safety in the transportation industry. However, each administration prepared an economic evaluation estimating the costs and benefits of the programs—discounted over 10 years. Compared to a 10-year estimated cost of about $2.1 billion, the administrations estimated that the drug-testing programs will provide benefits of about $8.7 billion. Each administration's analysis showed a positive benefit-to-cost ratio—ranging from 1.03 to 1 for FAA to 4.6 to 1 for FHWA.

[1]Department of Health and Human Services, "Mandatory Guidelines for Federal Workplace Drug Testing Programs," Federal Register, Apr. 11, 1988.

(See table 1.3.) We did not independently verify the accuracy and adequacy of the administrations' estimates of program costs and benefits used in the economic evaluations.

Table 1.3: Estimated Benefits and Costs and Benefit-To-Cost Ratios

Dollars in millions

Administration	Benefit	Cost	Ratio
FAA	$138 6	$134 5	1 03 1
FHWA	8 145 0	1 770 0	4 60 1
FRA	87 8	80 9	1 09 1
RSPA	41 7	29 0	1 44 1
UMTA	162 2	85 7	1 89 1
USCG	127 8	45 0	2 84 1
Total	**$8,703.1**	**$2,145.1**	**4.06:1**

Source Economic evaluations prepared by each administration and the OST

In developing their economic evaluations, the administrations used various assumptions in estimating how many employees would be tested, the costs of the testing, and the benefits to be derived. For example, USCG estimated that 15 percent of the initial screening tests for drugs would require confirmation tests, on the basis of a 10-percent population drug use as reported by the National Institute for Drug Abuse in 1987 and 5 percent for false positives.

Each administration, except FRA, generally used a cost estimate of $25 for the initial screening drug test, $35 for the confirmation test, and $35 per test for administrative costs, on the basis of DOT's experience with its internal drug-testing program for federal employees. FRA used a cost estimate of $300 per test, which included testing and administrative costs, on the basis of its experience with its current postaccident and reasonable-cause testing of railroad workers.

Benefits were estimated generally on the basis of accidents and property damages avoided, lives saved, and injuries avoided. For example, FHWA estimated program benefits of $8.1 billion primarily on the basis of an estimate of accidents avoided and related costs. It also included several hundred million dollars annually in estimated benefits for reduced absenteeism and pilferage. In addition to estimated benefits from accidents avoided, FAA included $54.3 million in estimated productivity gains resulting from reduction in drug use, assuming that drug users are 5 percent less effective on their jobs than nondrug users.

Legal Issues

The regulations requiring drug tests of private sector transportation employees involve complex legal issues associated with the rights of those employees. Litigation challenging DOT's drug-testing regulations was initiated in various federal district and appellate courts immediately after the regulations were issued. As of July 1989, 22 lawsuits had been filed and procedurally consolidated, challenging, among other things, the constitutional basis for random testing, the administrations' basic legislative authorities to mandate private employer drug testing, and whether sufficient evidence exists of a drug abuse problem in the transportation industry to justify the need for the program. In addition, two bills have been introduced in the Congress that would legislate drug and alcohol testing for certain DOT administrations. Chapter 4 discusses the legal issues surrounding DOT's industry drug-testing program while chapter 5 contains a summary of proposed congressional legislation and how it compares with DOT's program.

Covered Employees

In coordinating the administrations' drafting of drug-testing regulations, OST officials stated that OST had specified that safety-sensitive and security-related positions should be tested. However, OST did not define "safety-sensitive" and "security-related" or specify which positions should be covered. They further stated that the determination of employee positions to be tested was largely left to the discretion of each administration, which developed its own rationale for which industry employee positions would be considered safety-sensitive and security-related. For example, the FAA and UMTA programs include mechanics whereas FHWA's program does not. Further, unlike the FHWA program that covers only vehicle operators, the FRA and FAA programs cover the rest of the crews assigned to operate aircraft and trains as well as others in the industry, such as security personnel in the FAA program and dispatchers in the FRA program.

Several of the lawsuits filed against DOT's drug-testing program are contesting the coverage of certain employee groups. The discussion of each administration's program in chapter 2 contains a description of the employee positions covered by each program.

Objectives, Scope and Methodology

The Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, requested us to review DOT's drug-testing program for private-sector transportation workers. As agreed with the Chairman's office, our objectives were to (1) provide background information about DOT's drug-testing program, including the

development of the six transportation administrations' economic evaluations, (2) obtain information on the status of each administration's program, (3) determine whether OST was providing sufficient guidance to the administrations to ensure effective program implementation, (4) describe the legal issues surrounding the regulations, and (5) summarize the provisions of proposed congressional legislation and how the provisions compare with DOT's drug-testing regulations. To meet our objectives, we

- determined how DOT and the administrations developed their programs,
- reviewed the administrations' economic evaluations,
- identified the status of each administration's drug- testing program and the approaches to be used in implementing their programs,
- determined OST's role in providing direction to the administrations to ensure that the programs are effectively implemented,
- summarized recent Supreme Court decisions and identified pending legal challenges to DOT's drug-testing regulations, and
- analyzed proposed congressional legislation and determined how the legislative provisions compared with DOT's drug- testing regulations.

Our review was performed at OST and the headquarters of each of the six administrations. We held discussions with OST officials and representatives of each of the six administrations and reviewed relevant agency documentation to determine how DOT and the administrations developed their programs. To assess the adequacy of OST's role in providing direction to the administrations in implementing the industry drug-testing programs and the plans for and the status of their implementation of the programs, we

- reviewed the drug-testing regulations and economic evaluations prepared by each of the six administrations,
- interviewed representatives of OST and each of the administrations to identify their roles and responsibilities related to the development of the industry drug-testing programs and the current status of program implementation, and
- obtained and reviewed other documentation, such as correspondence and guidance that OST had issued to the administrations and guidance that the administrations had provided industry employers.

To identify the calculations of program costs and benefits, we reviewed each of the administrations' economic evaluations to identify the data sources and assumptions used in their development and discussed the

rationale for the analyses with administration and OST personnel. However, we did not evaluate the accuracy and adequacy of the cost and benefit data used in the economic evaluations.

Our work to identify legal issues associated with DOT's industry drug-testing program included (1) identifying and summarizing the issues and questions raised in the lawsuits filed by various individuals and groups against DOT's industry drug-testing programs and (2) reviewing the two decisions recently handed down by the Supreme Court concerning post-accident testing of railroad employees and preemployment testing of U.S. Customs Service officers. Also, we analyzed proposed legislation that would mandate the drug-testing of private-sector transportation employees covered by certain transportation administrations and compared the provisions of those bills to DOT's industry drug-testing program.

We discussed the facts contained in this report with responsible officials from each of the administrations as well as officials from the Office of the Secretary. These officials generally agreed with the facts as presented, although they also provided some views on our observations, which are reflected in the body of the report where appropriate. However, as agreed with the requester, we did not obtain official agency comments on this report.

Our review, conducted from January 1989 through August 1989, was performed in accordance with generally accepted government auditing standards.

Status of Drug-Testing Programs

During our review, six DOT administrations—FAA, FHWA, FRA, RSPA, UMTA, and USCG—were proceeding with implementing their industry drug-testing programs. FAA was planning to add staff—11 at headquarters and 10 in the field—to implement its program. FRA and UMTA were adding a staff member in their headquarters to manage their programs. The other administrations planned for existing staff to absorb the duties required to implement their drug-testing programs.

The final drug-testing regulations were issued by each administration on November 21, 1988. Drug testing was generally scheduled to be initiated by the end of 1989 for larger employers with 50 or more covered employees, and small employers were generally scheduled to begin testing a year later. Three administrations—FRA, RSPA and USCG—extended the dates when large employers were to begin testing from 1 to 4 months. These extensions were made to allow employers more time to design their drug-testing programs and to allow the administrations more time to resolve legal and administrative matters. A preliminary injunction has been issued against FHWA's regulations that prohibits the initiation of random and postaccident testing without reasonable cause. FAA also extended the time that employers had to submit implementation plans for approval by 4 months but did not extend the deadline requiring employers to begin drug testing. Table 2.1 shows the current implementation dates for each of the administrations.

Table 2.1: Original and Revised Implementation Dates for Employers to Begin Drug Testing

	Original date			Revised date		
Administration	Large employers	Medium employers	Small employers	Large employers	Medium employers	Small employers
FAA	12/18/89	02/14/90	08/13/90	NC	NC	NC
FHWA[a]	12/21/89	NA	12/21/90	NC	NA	NC
FRA	11/20/89	11/20/89	11/20/89	01/16/90	07/02/90	11/01/90
RSPA	12/21/89	NA	04/23/90	04/20/90	NA	08/21/90
UMTA	12/21/89	NA	12/21/90	NC	NA	NC
USCG	06/21/89	12/21/89	12/21/90	07/21/89	NC	NC

Notes:
NC = No Change. NA = Not Applicable. The administration has not designated this size of employer.
[a]A preliminary injunction was issued against FHWA's initiation of random and postaccident testing.
Source: DOT administrations' drug-testing regulations.

The following sections (1) provide an overview of each administration's drug-testing program, including employee coverage, (2) explain how the administrations are planning to implement their programs, and (3)

describe the status of each administration's drug-testing program at the time of our review.

FAA

Overview

FAA has regulatory authority for ensuring aviation safety under the Federal Aviation Act of 1958, as amended. Under this authority, FAA issued proposed drug-testing regulations on March 14, 1988, requiring domestic and supplemental air carriers, air taxi and commuter operators, certain commercial operators, certain contractors of these operators, and air traffic control facilities to have a drug-testing program. The final regulations were issued on November 21, 1988.

FAA's industry drug-testing program covers about 4,300 employers who employ about 538,000 workers in safety-sensitive or security-related functions. These functions include duties performed as a flight crew member, flight attendant, flight or ground instructor, flight tester, aircraft or ground dispatcher, maintenance worker, aviation security or screening personnel, and air traffic controller. Also covered by the regulations are contractor personnel performing the same functions.

Program Implementation

FAA's Drug Abatement Branch, Office of Aviation Medicine, is responsible for implementing the drug-testing program. The branch had a staff of 7 of the 11 positions authorized. In addition, FAA assigned 10 employees to implement the program at various field locations. According to FAA's drug-testing program manager, FAA is implementing its drug-testing program in a manner consistent with the way it manages other aviation programs for maintenance, operations, and security. FAA has traditionally played a prominent role in compliance enforcement and, as such, is requiring employers to prepare and submit implementation plans for review and approval. FAA issued a comprehensive manual to employers on how they should conduct their drug-testing programs, plans to periodically monitor employers for compliance with its regulations, and is requiring employers to submit semiannual reports on the results of drug tests.

Program Status

FAA's regulations require large employers to implement their programs by December 18, 1989. FAA considers employers with 51 or more covered

employees as large employers, employers with 11 to 50 covered employees as medium employers, and employers with fewer than 11 covered employees as small employers. In April 1989, FAA gave all employers an extra 4 months to submit their implementation plans to FAA for review and approval. FAA needed more time to decide on a process for reviewing and approving employers' implementation plans and to enter into a contract with a firm to assist in the process. The revised schedule required large employers to submit their plans by August 18, 1989, medium-sized employers by October 17, 1989, and small employers by April 15, 1990. When FAA extended the time employers had to submit implementation plans, it did not change the dates when employers had to begin drug testing—December 18, 1989, for large employers; February 14, 1990, for medium-sized employers; and August 13, 1990, for small employers.

According to an FAA Drug Abatement program official, FAA selected the Transportation Systems Center as the contractor to develop software to assist it in tracking and monitoring employer implementation plans and to establish an employer-reporting system. An FAA contractor was also developing material for Medical Review Officer training modules to be ready in late July 1989 with training expected to be provided to the Medical Review Officers from September 1989 to January 1990. Under DOT's drug-testing regulations, the Medical Review Officer, a licensed physician with knowledge of drug abuse problems, has several functions including reviewing the laboratory results to determine if an alternative medical explanation exists for any confirmed positive test result.

FHWA

Overview

FHWA, under various statutes, is responsible for prescribing safety requirements for the motor carrier industry. FHWA issued proposed drug-testing regulations on June 14, 1988, to cover drivers of commercial motor vehicles with a gross vehicle weight rating over 26,000 pounds, vehicles transporting hazardous materials, and certain buses carrying more than 15 passengers. Its final regulations were issued on November 21, 1988. FHWA estimates that its regulations cover about 3 million truck and bus drivers who work for about 200,000 employers. A majority of these employers are small firms. For example, FHWA estimated that between 60 and 70 percent of the motor carriers have fewer than eight truck drivers. In addition, FHWA estimates that about 20,000 trucking companies enter and exit the business each year.

Program Implementation

FHWA's drug-testing program is administered by FHWA's Federal Programs Division, Office of Motor Carrier Safety—Field Operations. To accomplish this, FHWA officials said they plan to fold the drug-testing program into its other programs such as the commercial driver's license, medical fitness, and safety inspection programs. In its field offices, FHWA plans to use its current safety inspector work force to monitor employers' compliance with its drug-testing regulations.

Program Status

FHWA's drug-testing program is to be phased in with larger employers (50 drivers or more) required to begin drug testing by December 21, 1989, except for random drug testing. Employers with fewer than 50 drivers have until December 21, 1990, to implement their programs. Employers of all sizes have an additional year to start random drug testing. FHWA is proceeding with its planned implementation although the U.S. District Court, Northern District of California, issued a preliminary injunction in January 1989 staying the implementation of the drug-testing regulations pertaining to postaccident (other than for reasonable cause to suspect drug use) and random testing.

FRA

Overview

Under the authority of the Railroad Safety Act of 1970, as amended, FRA is responsible for regulating railroad safety. On May 10, 1988, FRA issued proposed drug-testing regulations covering certain safety-sensitive employees referred to as "Hours of Service" employees, i.e., primarily train crews, dispatchers, and signalmen. FRA issued its final drug-testing regulations on November 21, 1988. Its regulations added random drug testing to FRA's existing drug-testing regulations, which already required preemployment, postaccident, reasonable cause, periodic, and return-to-duty drug testing. FRA's industry drug-testing program covers about 500 railroads employing about 90,000 employees who are subject to testing. The 20 largest railroads account for about 90 percent of all the railroad employees.

Program Implementation

FRA's Office of Safety is responsible for implementing the industry drug-testing program as well as coordinating DOT's internal federal employee drug-testing program for the FRA. The Office has one employee responsible for coordinating both programs. FRA's approach to implementing its

drug-testing program includes requiring employers to submit implementation plans so that the railroads focus on the program and anticipate and deal with their problems as they establish their programs. The FRA regulation requires employers to report test results and to perform compliance monitoring for the drug-testing program using existing field staff resources.

Program Status

Originally, FRA's drug-testing regulation required each railroad to begin random testing by November 20, 1989, but the date was extended to allow employers of all sizes more time to submit their drug-testing plans. In May 1989, FRA adjusted the program's implementation dates to ensure that employers have sufficient time to develop certain aspects of the program, such as selecting laboratories, before embarking on the final stages of implementation. Under the program, large employers—Class I freight railroads, the National Railroad Passenger Corporation, and railroads providing commuter service—are required to submit random-testing program plans for approval by October 2, 1989, with implementation to begin by January 16, 1990. For medium-sized employers—Class II rail carriers—plans are to be submitted by April 2, 1990, with implementation to begin by July 2, 1990. Small employers—16 or more covered employees—are required to submit plans by July 2, 1990, with implementation to begin by November 1, 1990. Employers with fewer than 16 covered employees who do not use the mainline tracks of larger railroads are exempt from FRA's program.

RSPA

Overview

RSPA regulates safety in the liquid and natural gas pipeline industry. Acting under the authority of the Natural Gas Pipeline Safety Act of 1968, as amended, and the Hazardous Liquid Pipeline Safety Act of 1979, as amended, RSPA issued proposed regulations on July 8, 1988, requiring operators of pipeline facilities used for the transportation of natural gas or hazardous liquids and operators of liquified natural gas facilities to have a drug-testing program. RSPA's final drug-testing regulations were issued on November 21, 1988. Its program covers employees who perform certain safety-sensitive and security-related functions. These employees include operation, maintenance, and emergency response personnel, including contractor personnel performing the same functions. Its industry drug-testing program covers about 2,140 liquid

and natural gas transmission and distribution companies employing about 116,500 employees subject to drug testing.

Program Implementation

RSPA's drug-testing program is being managed by the Office of Pipeline Safety. According to RSPA officials, RSPA did not assign personnel specifically to the drug-testing program. Instead, RSPA expects existing personnel in the Office of Pipeline Safety to incorporate the drug-testing program into their normal duties.

RSPA planned by September 1, 1989, to have provided guidance to employers on how they should develop and implement their drug-testing programs. Further monitoring of employer compliance will be done as part of regular safety inspections.

Program Status

RSPA initially required large employers with more than 50 covered employees to implement their drug-testing programs by December 21, 1989, and small employers, with 50 or fewer covered employees, to implement by April 23, 1990. However, on April 13, 1989, RSPA extended the implementation dates for the drug-testing program to provide RSPA sufficient time to reevaluate the types of employees covered by the regulations. The extended implementation dates require large employers to begin drug testing by April 20, 1990, and small employers by August 21, 1990. According to RSPA program personnel, the extension was necessitated by petitions for reconsideration filed by industry representatives concerning the drug-testing regulations. RSPA expects to issue a Federal Register notice concerning its reevaluation in October 1989.

RSPA planned to issue guidance to employers by September 1, 1989. Also, RSPA officials are developing a section on the drug-testing program for inclusion in the enforcement manual used by RSPA and state inspectors, which they expect to have ready by the time the first testing begins.

UMTA

Overview

UMTA is a grant-making agency that administers the federal urban mass transportation program. Acting under authority of the Urban Mass Transportation Act of 1964, as amended, UMTA issued proposed regulations on July 8, 1988, requiring grant recipients (grantees) to have a

drug-testing program as a condition to their receipt of federal funds. The regulations, issued in final form on November 21, 1988, require that all employees who perform safety-sensitive functions and their supervisors be included in the program. These functions include operating a passenger vehicle, controlling dispatch or movement of a passenger vehicle, maintaining equipment used in passenger service, and supervising any of these functions. Also, the regulations cover contractor personnel performing the same functions. UMTA's industry drug-testing program covers about 1,600 mass transit systems employing about 195,500 employees who are subject to testing.

Program Implementation

UMTA's drug-testing program is being managed by its Office of Technical Assistance and Safety, which assigned one employee to manage the program. According to UMTA program personnel, the drug-testing program was the first of its type for that office, and they do not routinely undertake enforcement activities because UMTA is a grant-making rather than a regulatory agency. However, UMTA provided comprehensive guidance on developing plans to employers, plans to monitor employers' compliance with its regulations, and requires employers to report drug test results.

Program Status

UMTA's drug-testing regulations require that all grantees that service an area with a population exceeding 200,000 have their drug-testing programs operating by December 21, 1989. Smaller grantees that service an area with a population of less than 200,000 are to have their programs operating by December 21, 1990. As of June 1989, UMTA officials said they were progressing with implementation of the drug-testing program. UMTA had awarded demonstration grants totaling $794,000 to six state transportation departments to enable them to help local transit authorities comply with UMTA's drug-testing regulations. Also, a contractor to UMTA is developing training for grantee supervisors to help them recognize and detect potential drug users and make reasonable-cause testing referrals. The training is to be available to grantees in December 1989.

USCG

Overview

USCG is responsible for ensuring marine safety, including statutory authority to deny or revoke licenses of commercial vessel personnel for

illegal drug use. The USCG issued proposed regulations on July 8, 1988, requiring the establishment of drug-testing programs by maritime industry employers to reduce the incidence of drug abuse by commercial vessel personnel. The regulations, issued in final form on November 21, 1988, cover an estimated 120,000 employees on about 19,000 U.S.-flag commercial vessels, such as fishing boats and marine transport vessels. The regulations include all employees who perform safety-sensitive functions, including federal and state harbor pilots. It covers about 250 large companies (more than 50 covered employees), 300 medium-sized companies (with 11 to 50 covered employees), and 11,450 small companies (with 10 or fewer covered employees). The regulations, however, exclude crews of foreign commercial vessels who operate in U.S. waters except they are subject to postaccident testing.

Program Implementation

USCG placed the drug-testing program in its Marine Investigation Division, which is responsible for accident investigations and the assessment of penalties for violation of laws and regulations. In the field offices, the program will be placed in the Marine Safety Division. USCG does not plan to commit full-time staff to the drug-testing program, either in headquarters or in its field offices. The program will be absorbed into the USCG's regular operations.

Program Status

USCG's drug-testing regulations required that preemployment testing was to begin by June 21, 1989, and that other types of testing, including random, begin by December 21, 1989, for large employers. Medium-sized and small employers were allowed 6 months and 18 months longer, respectively, to begin some testing, with all employers' complete programs to be implemented by December 21, 1990. However, at the request of the U.S. District Court of the District of Columbia, which was hearing arguments in lawsuits against the USCG's program, the USCG extended the program implementation dates by 30 days—to July 21, 1989, for larger employers only.

During June 1989, the USCG program manager told us that USCG was drafting guidance for its field offices to use in answering questions from employers and other industry representatives. In addition, according to USCG officials, they plan to revise their accident-reporting form to incorporate the results of postaccident testing of employees.

OST Guidance Essential for Effective Industry Drug-Testing Programs

The six DOT administrations, for the most part, plan to incorporate their new drug-testing programs into their existing safety programs. However, the implementation approaches of four of the administrations will not provide them assurance that employers are complying with the administrations' private-sector drug-testing regulations because certain management practices that we identified as essential to effective implementation of a drug-testing program were missing. These management practices include providing comprehensive written guidance to employers on how they should develop their individual drug-testing programs, requiring employers to submit their drug-testing programs for review and approval, and developing a mechanism to monitor employer compliance with each administrations' regulations.

Additionally, the DOT will not be in a position to evaluate the effectiveness of each administration's drug-testing program because the administrations were not provided guidance on (1) the drug test results and cost data needed to evaluate program results or (2) the evaluation procedures the administrations should use in order for DOT to monitor its progress toward achieving its goal of a drug free transportation workplace.

OST provided overall broad policy direction and management oversight to the administrations in developing the drug-testing regulations. Consistent with its usual practice, OST is permitting the administrations to implement and manage the programs as part of their regular safety programs. In contrast, because of the size and importance of DOT's drug-testing program for its own employees, the Secretary established a focal point within OST to provide policy direction and oversight.

FRA is the only administration that has developed a penalty schedule in its regulations to use when employers fail to comply with the drug-testing regulations. Instead, the administrations plan to rely on their present statutory authority, which may not be appropriate for ensuring compliance with the drug-testing regulations.

Management Practices Essential for Effective Testing Program

In our 1987 report on the management improvements needed by DOT to enhance policy and program effectiveness,[1] we noted opportunities to improve policy formulation, implementation, and monitoring. Some of the specific benefits we foresaw included an improved ability to

- employ empirical data and analysis in support of policy making in areas such as safety regulation,
- define and measure program objectives for assessing both progress in meeting safety goals and the impact of policy changes, and
- achieve consistency in policies and regulations across transportation administrations, such as in rules governing drug abuse.

Additionally, we identified three management practices during this review that we believe are necessary for effective implementation of a transportation industry drug-testing program. These management practices consist of

- providing comprehensive guidance on how employers should design and implement their drug-testing programs,
- subjecting employer drug-testing plans to review and approval, and
- monitoring employer compliance with program requirements.

Additionally, we identified two elements that we believe are essential for effective program evaluation. These elements are

- requiring employers to report drug-testing results and costs and
- developing department-wide program evaluation procedures to determine whether the programs are achieving DOT's goal of a drug-free workplace and whether program changes are warranted.

Further, additional guidance in these areas is needed so that overall program success can be measured.

According to OST officials, the Secretary has not established a focal point in the department to directly oversee the implementation, management, and evaluation of the administrations' programs. In contrast, recognizing the sensitivity and magnitude of the internal drug-testing program for federal employees, the Secretary established a focal point at the OST level to coordinate and oversee that program. OST placed the day-to-day

[1]Department of Transportation: Enhancing Policy and Program Effectiveness Through Improved Management (GAO/RCED-87-3, Apr. 13, 1987).

management and administration of the internal program with the Assistant Secretary for Administration. The Drug Awareness and Education Division within DOT's Office of Personnel is responsible for operation and coordination of DOT's internal drug-testing program for federal civilian employees.

In line with the opportunities for management improvement described in our 1987 report, we believe that the administrations could benefit by adopting a more systematic and consistent approach to implementing, monitoring, and evaluating their drug-testing programs. Because it is responsible for providing broad policy direction and management, OST could provide guidance to the administrations outlining the required approach for ensuring effective program implementation throughout the transportation industry as well as guidance on how to measure program success.

OST Oversight Essential for Effective Implementation

We found that the FAA and FRA implementation approaches included the management practices we identified as needed for effective program implementation—comprehensive program design guidance for employers, review and approval of employer plans, and monitoring of employer compliance. On the other hand, the USCG approach did not include any of these management practices. Table 3.1 shows the management practices contained in each administration's implementation approach.

Table 3.1: Extent of Effective Management Practices Included in Implementation Approaches

Administration	Comprehensive written employer guidance	Required employer plan submission	Plans for compliance monitoring
FAA	yes	yes	yes
FHWA	no	no	yes
FRA	yes	yes	yes
RSPA	yes	no	yes
UMTA	yes	no	yes
USCG	no	no	no

Source: Administrations' program managers

The administrations provided various rationale for their chosen implementation strategy. The reasons for not incorporating a particular management practice into their strategy or for taking a particular approach range from not having adequate staff to complete the tasks to merely following their traditional role with respect to implementing their safety programs. However, the size, cost, and multiadministration nature of the

drug-testing programs dictate that they be implemented consistently and fairly by employers in all the administrations. A focal point within OST would be best equipped to ensure that this occurs.

In discussing the facts in this report with OST officials, they stated that the Secretary, DOT has appointed a Special Assistant to oversee all of DOT's drug-testing programs. This Special Assistant has not yet decided what role to play in the drug-testing programs.

In the following sections, we describe (1) the three essential management practices the programs should contain, (2) the strategy each administration plans to use in implementing its drug-testing program, and (3) each administration's rationale for its implementation approach.

Employer Guidelines

Four administrations—FAA, FRA, RSPA, and UMTA—have developed or plan to develop written guidelines in addition to their regulations to help employers implement a drug-testing program. Comprehensive and consistent guidance to all employers on how the drug-testing program should be performed is necessary to ensure that the programs are properly implemented and meet program requirements. In reviewing the guidelines prepared by FAA, FRA, RSPA, and UMTA, we identified specific information that guidance to employers could include. This information includes

- general requirements and milestones, such as a time frame and requirements for submission of a testing-program implementation plan;
- drug-testing procedures, including categories of testing, specimen collection, selection of a testing laboratory, selection of the Medical Review Officer, and maintaining privacy and confidentiality;
- requirements for an employee assistance program, which helps employees deal with drug or alcohol dependency or other personal problems, and related employee training;
- program record-keeping and data-reporting requirements, including program costs and results, and criteria or standards for gauging the program's success and effectiveness; and
- alternative procedures for randomly selecting employees for testing, types of accidents that require employee testing, and procedures for conducting reasonable-cause testing.

FAA initially provided employers with an advisory circular designed primarily to provide guidelines for topics it expects employers to address in

developing their implementation plan—including a plan format. However, this circular did not include information on how to randomly select employees for testing. In June 1989, FAA issued additional guidance to employers. FAA used a contractor to develop this extensive manual for use by employers in implementing their programs.

FHWA does not plan to provide written guidance to employers or employer associations on how to implement the drug-testing program because, according to FHWA staff, it already has an overload of regulations to implement. Rather, FHWA's approach to providing guidance is to respond to inquiries from employers and industry representatives concerning program implementation. FHWA has also participated in some industry seminars and meetings to explain the program. While it may be difficult for FHWA to create and distribute this guidance, the 200,000 motor carrier employers will likely find that implementing an adequate program will be difficult without such guidance because certain aspects, such as establishing an approach to appropriately select employees for random testing, are complex.

FRA was planning to provide program guidance for employers' use in implementing the program. FRA Offices of Safety and Chief Counsel staffs developed a discussion document to help employers implement the new random-testing requirements. This document, which is considered unofficial, identifies issues and options concerning random testing. For example, it discusses criteria to ensure that each covered employee has a substantially equal statistical opportunity of being selected for testing. Various methods of selection are described including use of employee name, employee number, or home unit designation. According to FRA officials, although this paper was not distributed to each railroad, it was given to interested parties in early 1989 including attendees at a workshop for the American Association of Railroads and at a seminar for railroad medical officers. Additional guidance was being prepared for issuance in August 1989.

RSPA, according to program personnel, planned to develop and issue an advisory circular to employers by September 1, 1989. They chose to issue program guidance to employers because the regulations for the drug-testing program differ considerably from other types of pipeline regulations. RSPA officials have also discussed its drug-testing program in seminars sponsored by industry groups such as the American Public Gas Association and American Gas Association.

UMTA provided written guidance to grantees because UMTA officials believed it was appropriate to do so. The guidelines, which were prepared by a private contractor, cover all aspects of the drug-testing regulations and provide step-by-step instructions for developing and implementing drug-testing programs. For example, the guidelines contain instructions on how to establish a collection site and select a testing laboratory. In addition, UMTA representatives discussed its drug-testing program in seminars sponsored by industry groups such as the American Public Transit Association.

The USCG program manager stated that USCG is developing written guidelines for use by its field offices to respond to industry questions about implementation of the drug-testing regulations. The guidelines are intended to discuss the most frequently asked questions about the program. USCG has distributed 3,900 reprints of the regulations to organizations on its mailing lists, including industry groups, and the majority of the large and medium-sized companies it regulates. According to the USCG program manager, it has also visited about 20 ports around the country to discuss the regulations at the invitation of industry groups. For example, USCG staff met with about 250 members of the National Association of Passenger Vessel Owners in San Diego. The USCG has also responded to telephone requests for information on the testing program from industry employers and other representatives.

Submission of Employer Implementation Plans

The development and submission of employer drug-testing program implementation plans will provide DOT and the administrations with the basis for ensuring that their programs are adequately designed to meet the requirements contained in the administrations' regulations and to achieve program goals and objectives.

Two of the six administrations—FAA and FRA—require the submission of employer program implementation plans for review and approval. FHWA and USCG officials stated that they are not requiring plans because of the large number of employers—200,000 and 12,000, respectively—and the lack of resources to review and approve the plans. According to RSPA and UMTA officials, it was not their normal practice to require plans to be submitted by employers for such programs. Without such a requirement, however, it will be difficult for these four administrations to have assurance that employers are implementing an effective testing program. This lack of assurance will also pressure these administrations to have more adequate compliance-monitoring activities to ensure that the employers have testing programs in place.

FAA requires employers to prepare and submit program implementation plans for review and approval. FAA contracted with the Transportation Systems Center to obtain assistance with plan review and approval. FAA officials developed, with the contractor, a plan approval checklist. Employer plans that do not meet the criteria for approval will be returned to the employer with instructions explaining what must be changed to make the plan acceptable to FAA.

In August 1989, FAA announced that its August 18, 1989, deadline to receive drug-testing plans from the large airlines had passed and many airlines had missed the deadline. FAA was expecting to receive 500 to 600 plans in August but had received only about 200 plans. In addition, most of the plans that were received were inadequate and had been returned for revisions. As of September 8, 1989, FAA had approved 38 of the 245 plans received.

According to FHWA officials, FHWA is not requiring employers to submit their drug-testing plans for review and approval because FHWA program personnel are concerned about the paperwork burden involved with requiring each of the 200,000 employers to submit a written plan and the lack of sufficient resources within FHWA to review and approve the plans. In addition, FHWA officials stated that it is not their normal operating procedure to require such documentation when new regulations are issued. However, FHWA's drug-testing regulations provide for and encourage small employers and independent owner-operators to join programs administered by larger firms or associations that could be formed to serve smaller firms. This could reduce the total number of plans submitted by employers and associations.

FRA's regulations require employers to submit only a random-testing program plan because it already had requirements in place for employers to test employees in categories other than random. FRA has requested in its regulation that the plan cover such areas as the process for selecting employees for testing, testing procedures and safeguards, and the notification process when employees are selected for random testing. Although FRA estimates that the nation has about 500 railroads, it expects to receive for review only about 200 plans because it has exempted employers with less than 16 covered personnel and short line and regional railroads are allowed to form associations for implementing the program.

According to FRA officials, FRA's Office of Safety, which is responsible for approving each plan, is planning to use a technical review team consisting of safety staff, chief counsel staff, and perhaps outside officials to review the plans. If FRA decides a particular program does not meet program standards, it plans to notify the employer with a specific explanation of the needed revisions. Employers must resubmit their plan with such revisions in order to gain final approval.

According to RSPA officials, RSPA is not requiring employers to submit program implementation plans for review and approval. The regulations require, however, that each employer develop and follow a written drug-testing plan. The plan must contain methods and procedures for compliance with the regulations, the name and address of each laboratory that analyzes the specimens collected for drug testing, and the name and address of the employer's Medical Review Officer.

UMTA, according to its program personnel, is not requiring grantees to submit plans detailing how they intend to implement their drug-testing programs. Instead, UMTA will require that each grantee certify, in writing, that it is in compliance with the requirements of the regulations. This is consistent with UMTA's normal practice of having grantees self-certify that they are complying with applicable UMTA regulations. Also, each grantee must establish a policy on drug use in the workplace that must be adopted by its governing body and disseminated to all affected employees. UMTA recommends that the policy be in writing.

USCG, according to program officials, is not requiring employers to submit implementation plans because it does not have sufficient staff resources to review and approve the plans. However, similar to FHWA, the USCG's regulations provide for the formation of associations for the implementation of the drug-testing program. Although the USCG regulations do not require employers to submit program implementation plans for approval, they do provide for the USCG to review plans at the request of a vessel owner. At the time of our review, the USCG had received some plans to review but had not developed criteria to use in reviewing them. These reviews are considered to be informal and of an advisory nature rather than a formal approval.

In our discussion of the facts in this report with responsible administration officials and officials from OST, the officials expressed concern about our call for written implementation plans, especially for FHWA. They stated that this would create a tremendous paperwork burden that would not be favorably received by the Office of Management and

Budget. Similarly, they stated that the additional paperwork associated with employer reporting would also be questioned by the Office of Management and Budget. We appreciate the extra burden such requirements would have on the industry, particularly with regard to trucking; however, we continue to believe implementation plans and program evaluation data should be required. The recent experience with the review and approval of implementation plans by FAA points to the value of such an exercise in ensuring that the plans are properly formulated.

Compliance Monitoring

A mechanism to provide for routine or periodic compliance monitoring is necessary to ensure that all affected entities are complying with the drug-testing program requirements. Only through adequate compliance monitoring will DOT be able to measure overall program effectiveness. Five of the six administrations plan to perform program compliance monitoring. While the USCG does not plan to include drug testing in its vessel inspection program, it has an alternative approach to take immediate action to revoke the licenses of maritime personnel whose test results indicate illegal drug use.

As yet, the administrations have not completed development of their monitoring approaches. Because all six administrations carry out their respective safety-related compliance-monitoring functions differently and they may not be in contact with each employer in their respective industry each year, the aspects of the program that will be monitored and the frequency of compliance monitoring becomes an important consideration. For example, with about 200,000 employers in the trucking industry, FHWA needs to consider how frequently each employer or association can be expected to be monitored by FHWA to ensure compliance with the drug-testing regulations.

FAA officials stated that although FAA officials plan to routinely monitor employer compliance with the regulations by on-site evaluation, how the compliance review will be conducted has not been determined. Responsibility for compliance monitoring will reside in the Drug Abatement Branch of FAA's Office of Aviation Medicine.

FHWA, according to its personnel, plans to include the drug-testing program in its field inspection program. The Office of Motor Carrier Safety has a field staff of about 385 in 82 field locations. Recently, FHWA inspectors have been devoted extensively to visiting carriers to determine safety ratings. FHWA personnel plan to develop information on drug-testing regulations to be included in the safety packet provided to carriers

prior to the inspection visits, and FHWA will incorporate some degree of monitoring in those inspections. However, according to a April 1989 report prepared by the Congressional Research Service for the Chairman, Senate Committee on Commerce, Science, and Transportation, FHWA, given its existing inspector staff levels and the annual influx of new carriers, will not have visited 100,000 companies by the end of 1992.

FRA plans to add the random drug-testing program to its field inspection program to ascertain employer compliance with the regulations. The Operating Practices Inspectors have been reviewing existing drug-testing activities at railroads and will monitor for compliance with the new requirements. However, at the time of our review, FRA had not identified the criteria or procedures to be used in accomplishing the compliance-monitoring functions for random testing.

RSPA, according to its program personnel, plans to incorporate employer program compliance monitoring into its established inspection activities in keeping with its role as a monitor of pipeline operators. Inspections are performed by RSPA and state inspectors under authority delegated to them by RSPA. Each employer is visited by either a state or federal inspector on the average of once every 2 1/2 years. RSPA plans to incorporate data on the drug-testing program into its inspection checklist.

UMTA, according to its program manager, will routinely monitor employer compliance with the regulations by on-site evaluation. It plans to incorporate compliance monitoring into its triennial review process, which covers all grantees.

According to the USCG program manager, USCG does not plan to visit employers to inspect for compliance with the drug-testing regulations. Instead, he said the drug-testing program will be included in the USCG investigation activities because it plans to take action to revoke the licenses of any employees who test positive to illegal drug use.

Need for OST Guidance on Program Evaluation Strategies

OST has not (1) provided guidance to the administrations on the types of program test results and cost data needed from employers or (2) adopted a program evaluation mechanism for the drug-testing programs in order to evaluate the overall effectiveness of the program—two elements we believe are crucial for effective program evaluation. Although three administrations—FAA, FRA, and UMTA—have established reporting requirements in their regulations, which will provide them periodic

feedback from employers on drug test results, OST needs to establish standards for the data received as part of these reporting requirements.

Although none of the administrations have established evaluation mechanisms, most plan to eventually develop or incorporate some type of program evaluation mechanism. Evaluation mechanisms can be used at the outset to determine the need for short- and long-term program changes to ensure that a program's goals and objectives are being achieved and to evaluate the continuing need for the program. Such mechanisms in the administrations' drug-testing programs would allow the employers' test results data to be used to determine the degree to which program goals and objectives have been met. None of the administrations have established the mechanisms or criteria for making assessments of program success and effectiveness, even though certain parts of the programs are to be implemented this year.

The following sections describe the data each administration plans to gather as well as their current plans for program evaluation.

FAA

FAA is requiring semiannual reports of program data that include several specific data elements related to employee drug-testing results and the actions taken against employees who test positive. There is no requirement, however, for employers to report data on program costs, according to the program manager.

FAA has neither established how it will use the semiannual reports to evaluate the success or effectiveness of the program nor established criteria for making a determination of the programs' effectiveness. Also, data on program costs should be gathered because cost analyses to date have been based on only estimated costs. The program's impact, based on actual costs, should be reassessed and compared with the actual benefits being derived from the program.

FHWA

FHWA is requiring that employers keep specified records for 5 years. Specifically, employers must establish individual vehicle driver files that include the date of each test and the test results. In addition, FHWA personnel stated that FHWA plans to require motor carriers to provide information in their accident reports on drug test results. FHWA has not, however, established requirements for employers or associations to report on drug-testing results or costs because of the large volume of

reports that would need to be periodically submitted. Also, FHWA officials believe that the large annual turnover of motor carriers would make such a reporting system difficult to administer. Further, according to the officials, it is premature to decide that a report is needed for this program, and other alternatives may exist, such as sampling a representative number of firms to obtain test results. We recognize the problems with analyzing such a large volume of reports. However, FHWA cannot be ensured of program compliance or evaluate results without periodic reports from employers. In addition, the volume of reporting could be reduced substantially if a large number of employers join associations.

According to FHWA personnel, FHWA has not established mechanisms to gauge the effectiveness of the program. They said the new analysis group in the Federal Programs Division will be responsible for developing criteria to judge the effectiveness of all programs in the division including drug testing. Ideally, according to the personnel, it would be best to establish evaluation criteria first. However, the urgency to implement the program and to issue the final regulations was imposed by OST and did not provide FHWA with the flexibility to allow sufficient time to develop evaluation criteria.

FRA

FRA is requiring annual reports from employers to gain an understanding of the program's results as well as to provide a basis for evaluating the program. The annual reports are intended to provide various data including the number of employees tested, number of positive test results, number of disciplinary actions taken, and number of follow-up tests conducted. However, these reports do not require data on all types of drug testing performed, such as preemployment test results. Also, FRA does not request information on costs incurred by employers to administer the testing program. FRA plans to make provisions for an employer at some point to petition FRA to revise its level of testing on the basis of the firm's experience with drug testing. However, the regulations do not identify what the reduced level of testing should be.

It is important, according to FRA program personnel, to receive annual reports from employers in order to monitor results. With respect to its earlier drug-testing regulations covering testing categories other than random, FRA developed test results for postaccident testing that were used to interpret the extent of the drug abuse problem and additional steps necessary to improve the program. Reasonable-cause testing data are also required to be reported.

RSPA

According to program personnel, RSPA will not require operators to submit reports on program results because RSPA plans to review the records that operators are required to keep as part of its inspection of pipeline operators to ensure compliance with the regulations. Further, RSPA has not yet established criteria for judging the effectiveness or continuing need for the drug-testing program because, according to the personnel, these are matters of policy that should be determined in coordination with the rest of the department on the basis of data and experience gained as the program is implemented.

RSPA's regulations do, however, require each employer to maintain certain records, such as those related to the specimen collection process, number of employees tested by type of test, evidence of employee drug-awareness training, and employee drug test results. In addition, for employees who fail a drug test, the employer must retain records of the type of test failed, the functions performed by the employees, the disposition of employees, any records that demonstrate rehabilitation, and the age of each employee who failed a drug test. Employers are required to maintain the records for specified time periods. The administrator or the representative of a state agency must on request be furnished any records the operators have. There is no requirement, however, for employers to report data on incurred program costs. RSPA program officials stated that is consistent with RSPA's other safety programs. While RSPA has established record-keeping requirements for employers, we believe this information needs to be submitted to RSPA for review and analysis in order to determine if in fact a relationship exists between drug use and accidents.

UMTA

UMTA is requiring grantees to submit semiannual reports on their programs. The reports are to include 13 specific data elements, such as the total number of drug tests and the number of confirmed positive tests by occupational category. Records for individuals who do not pass a drug test, including all documentation supporting this determination, must be retained for at least 5 years. Administrative records, such as documentation on the random-testing selection process, must be kept for at least 1 year. There is no requirement, however, to collect or report data on grantee costs to conduct drug testing. According to UMTA program officials, cost data are not required to be reported because UMTA is not providing any funds to implement drug testing. However, UMTA does provide substantial operating funding annually to support local transit agencies through its grant programs and awarded demonstration grants

to six states to aid local transit authorities in complying with the drug-testing regulations.

Although UMTA is requiring routine reporting of program data, it has not yet established how it will use the data to evaluate program success or effectiveness. According to the UMTA program manager, criteria to judge the effectiveness of the program will become apparent from the data submitted semiannually by the grantees. The guidelines issued by UMTA state that the program's effectiveness should be periodically evaluated by the grantee and the evaluation should involve assessing trends in drug use and detection. However, although UMTA established reporting requirements with consideration given to the goal of evaluating the continuing need for the drug-testing program in its current form, UMTA has not established criteria for how this determination will be made.

USCG

The USCG requires employers to report certain information on drug test results. It requires immediate notification if licensees test positive for illegal drug use because USCG is required by law to initiate license revocation procedures against such personnel. According to the USCG drug-testing program manager, the USCG receives a large volume of accident reports and has recently added sections to these reports requesting information relating to drug and alcohol involvement in these accidents. The USCG drug-testing regulations do not, however, require employers to periodically aggregate test results or program costs. Again, the USCG program manager stated that the USCG is not requiring such reports because it does not have the staff resources to compile and review reported program data. Also, the program personnel believe the requirement to report such data would be burdensome to employers. However, three DOT administrations believe it is appropriate and are requiring such reporting for this program.

The USCG drug-testing program manager said the USCG has not developed program evaluation criteria because it has focused its attention to this point on establishing the drug-testing program and believe it is too early to develop criteria for judging the success of the program. He also stated that data on test results can be requested when needed after the program is operating because the USCG requires records to be retained 5 years for positive test results and 1 year for negative test results. However, development of an evaluation approach is part of the program design process in most new programs. In addition, while record keeping is essential, unless program results data are collected and analyzed on a

systematic basis, the USCG will not have needed information to evaluate the impact of its drug-testing regulations.

Need to Specify Employer Penalties

Although DOT's drug-testing program affects six DOT administrations, its regulations allow each administration to use its respective statutory authority to penalize employers who do not comply with the program regulations. These statutory penalties vary greatly among the administrations in severity.

For example, FRA, the only administration to specify penalties in its drug-testing regulation, specifies a penalty of $1,000 to $10,000 per offense for specific violations, such as the failure to submit to FRA for approval a random drug-testing program that satisfies program requirements. According to RSPA officials, RSPA can impose a fine of $10,000 per day per violation up to a maximum of $500,000 for violations such as an employer's failure to comply with the antidrug regulations. According to UMTA officials, UMTA can withhold federal funds from grantees who fail to comply with the antidrug rules. According to an official in FAA's Drug Abatement Branch, FAA has penalties for employers failing to comply with federal regulations, which range upwards from $1,000 per incident to loss of certification.

While the administrations spent a great deal of time developing their drug-testing regulations and have made plans to implement them, it appears little consideration has been given to the penalties that should be assessed against employers for noncompliance. Because of the significance DOT has placed on the drug-testing program to ensure a drug-free transportation industry, specific penalties should be published for each industry to serve as a strong deterrent to noncompliance. The success of DOT's program is dependent on the degree of compliance with the administrations' regulations.

Conclusions

DOT has emphasized the importance of an industry employee drug-testing program as a means to improve safety in the nation's transportation industry. We found that the FAA and FRA implementation approach for their drug-testing programs included the management practices we have identified as necessary for effective program implementation. However, the implementation approaches of FHWA, RSPA, UMTA, and USCG do not include each of these management practices. Certain administrations' approaches for implementing their respective drug-testing programs

also lack essential management practices we have identified as necessary to effectively monitor and evaluate their programs. Accordingly, those administrations will not know whether employers are complying with program regulations and will not be collecting the necessary data for evaluating the program's success, costs, and benefits.

OST provides overall broad policy direction and management oversight to DOT's administrations, but it does not as a usual practice centrally direct the management of programs for which the administrations have responsibility. However, as with DOT's internal drug-testing program for civilian employees, because of the multiadministration nature of the industry programs, their national focus, and their importance, OST could logically take an active role in the industry drug-testing programs. This active role should be in providing direction to the administrations to ensure that their implementation strategies contain the effective management practices required of programs of this magnitude and cost and that information is gathered that will enable DOT to measure the overall success of the program.

Most administrations gave little consideration to the penalties to be imposed on employers for noncompliance. Instead, they plan to rely on their statutory authority to regulate safety to penalize noncomplying employers. Because of the significance of the drug-testing program, merit exists for having each administration publish a specific penalty schedule for their respective industry to help deter noncompliance.

Recommendations

In order to oversee the Department's management of the industry drug-testing program to ensure effective implementation across all administrations, we recommend that the Secretary of Transportation establish an organizational focal point in OST to

- work with the administrations to incorporate effective management practices into their implementation approaches, including the practices we identified as essential to ensuring that employers are complying with drug-testing regulations, and
- adopt program evaluation criteria and provide the administrations with guidance on the types of information they should gather from employers to evaluate the overall success of the program and progress in meeting the goal of having a drug-free transportation workplace.

We also recommend that the Secretary direct each administration to publish a specific penalty schedule for employers who do not comply with the drug-testing regulations.

DOT's Drug-Testing Litigation

Litigation challenging DOT's industry drug-testing regulations was initiated the day the final rules were issued. Ultimately 21 lawsuits were filed challenging the constitutionality of various provisions of the administrations' regulations or for review of agency actions under the Administrative Procedure Act. The lawsuits sought to have the final regulations preliminarily enjoined while the substantive issues, which range from the constitutionality of random drug testing to DOT's basic authority to issue the regulations, were being reviewed.

According to the DOT's Office of General Counsel, procedural litigation, focusing on the court jurisdiction, and the transfer and consolidation of cases had resulted in the 21 lawsuits (See app. I.) being consolidated as of July 31, 1989. Each of the six administrations has at least one lawsuit pending against it. Only one suit, that against UMTA, has received a ruling. On September 22, 1989, the District Court for the District of Columbia ruled that UMTA has the authority to issue its drug-testing regulations. Petitioners have appealed that ruling. In addition to the 21 lawsuits against the administrations, the OST's interim final rule, specifying the drug-testing procedures to be used by all of the administrations, has been challenged on procedural grounds under the Administrative Procedure Act.

Although OST has decided not to provide program oversight for the drug-testing regulations, it has established a focal point in the Secretary's office to coordinate all of the litigation challenging DOT's industry drug-testing regulations. While it is unclear how the lawsuits will ultimately affect DOT's drug-testing program, DOT believes that one or more of the issues will likely be appealed to the Supreme Court. This process could take several years.

Recent Supreme Court Decisions Affecting DOT's Regulations

The DOT's regulations involve only the taking of urine samples to test for drug use and do not provide for the testing for alcohol.[1] The United States Supreme Court recently rendered two decisions that, when read together, upheld not only the government's right to require the use of urine tests to detect the use of drugs but also the use of urine, blood, and breath tests for alcohol and drugs. In Skinner v. Railway Labor Employees Association (109 S. Ct. 1402 (1989)), the Supreme Court upheld FRA-mandated drug and alcohol testing of certain employees by railroads following major accidents as a permissible search under the Fourth Amendment to the U.S. Constitution. In National Treasury Employees

[1]FRA and USCG regulations do, however, require postaccident alcohol testing.

Union v. Von Raab (109 S. Ct. 1389 (1989)), the Supreme Court ruled that preemployment drug testing of U.S. Customs Service officers applying for promotions involving drug interdiction functions or to positions where they were required to carry firearms was also a permissible search under the Fourth Amendment.

For the Fourth Amendment to apply to private-sector drug and alcohol testing, such tests must be determined to be a government action, not a private one. In Skinner v. RLEA, the Supreme Court decided that a railroad's drug and alcohol testing of its employees involved in an accident would be the equivalent of a government action because the testing was required by government regulation.

After deciding in both cases that the taking of urine samples constituted a "search" within the meaning of the Fourth Amendment of the U.S. Constitution, the Court determined that the government's interests outweighed employees' privacy concerns and thereby justified the searches in the absence of probable cause or a search warrant. For example, the Court disposed of the warrantless search issue in Skinner by determining that the FRA-covered railroad workers were part of an industry that was already pervasively regulated in order to ensure safety. In Von Raab, it held that Customs agents seeking promotions in drug interdiction-related work should have expected intrusive inquiries into their physical fitness for those special positions and thereby also should have had a diminished expectation of privacy.

According to the DOT's Office of General Counsel, two issues relevant to DOT's regulations have not yet been resolved by the Supreme Court. The first involves random drug testing. Since OST believes that random drug testing is the main deterrent feature of DOT's program, a decision of whether random urine drug testing of private-sector employees is constitutional is fundamental to DOT's program. The other issue that the Court has not yet resolved is whether any type of drug testing may be performed for workers who are not determined to be in a public safety-sensitive or law enforcement position.

Petitioners' Main Challenges to DOT's Regulations

Lawsuits filed against the administrations seek to enjoin enforcement of the regulations and have them declared unconstitutional or set aside for lack of authority. Most of the petitioners' arguments fall into four main categories challenging whether[2]

- the regulations are violative of the Fourth Amendment of the U.S. Constitution,
- the regulations are violative of the Fifth Amendment of the U.S. Constitution,
- DOT's regulations should be set aside on grounds provided by the Administrative Procedure Act, and
- the appropriateness of including certain employee positions in the program.

Fourth Amendment Protection

The Fourth Amendment issues that DOT's Office of General Counsel believes will be in dispute are the randomness of the testing and whether the government has demonstrated a sufficient legitimate interest to justify the searches. In Skinner, the Supreme Court referred to some of its earlier decisions in which it had held that the Fourth Amendment does not proscribe all searches, only unreasonable ones, and that the permissibility of a particular practice should be judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.

Random Testing

The main challenge of each administration's regulations involves the random drug-testing portion of the regulations. Plaintiffs argue, in order to justify Fourth Amendment protection, that private-sector drug testing of employees is really a government action. The crux of this argument is that the testing constitutes a search by the government and, absent a search warrant or probable cause, that search is violative of the Fourth Amendment of the U.S. Constitution.

As discussed earlier, the Supreme Court held in Skinner that the FRA's drug testing of private-sector employees was attributable to the government because of facets of FRA's regulations. DOT has not indicated that it intends to seriously challenge this issue in the current litigation. The question remaining is whether the random drug testing constitutes an illegal search under the Fourth Amendment absent a search warrant or the requirement of a behavior that provides probable cause for the search.

[2]The arguments in this section were taken from a sampling of court papers filed by petitioners.

Legitimate Government Interest Arguments

Many plaintiffs used the "legitimate government interest" argument to challenge DOT's regulations by asserting that the infrequency of testing makes it unlikely that testing will be a good predictor of unsafe employees and, therefore, will not affect safety. One complaint alleged that since the Coast Guard excluded foreign vessels from coverage and since 95 percent of U.S. exports and imports are carried on foreign flag vessels and a large percentage of foreign flag crews are U.S. citizens, testing of U.S. flag ships will have a negligible effect on the safety of the maritime industry.

Several plaintiffs argued that DOT did not present evidence that the new testing procedures would appreciably increase safety over programs that were already in place because of collective bargaining agreements. Finally, almost all complaints took the position that the mere presence of drugs in the body at the time of testing is not necessarily proof of impaired performance because of the length of time that the drug metabolites can remain in the body.

Other Challenges

Other Fourth Amendment challenges included assertions that the random tests might be arbitrarily conducted because the standards will be variously implemented by private employers or that individuals who are not in a safety- or security-related position will be tested.

Fifth Amendment Protection

Plaintiffs used a variety of Fifth Amendment arguments to challenge the constitutionality of the administrations' drug-testing regulations. The arguments involved issues of discrimination, privacy, self-incrimination, and due process.

Discrimination arguments were based on allegations that some small employers are excluded from coverage or given longer to implement different types of testing. Plaintiffs' privacy challenges are based on the argument that aspects of an individual's personal life that have nothing to do with drug use, such as medical treatment, may have to be made public. Some petitioners claimed that mandatory testing is a form of self-incrimination. Still other petitioners argued that losing one's job because of the presence of traces of drugs without a showing of job impairment is violative of the Due Process clause of the Fifth Amendment.

Administrative Procedure Act

Many petitioners argued that DOT's regulations should be set aside on grounds provided in the Administrative Procedure Act. These arguments fell into categories that DOT or the administrations either had exceeded their statutory authority to regulate the transportation industry or that DOT lacked supporting evidence to require drug testing and that the regulations were thereby arbitrary and capricious and an abuse of discretion.

With respect to whether DOT or the administrations had exceeded their statutory authority, many plaintiffs challenged the administrations' regulations as generally exceeding their statutory authority. Other plaintiffs were more specific. For example, one plaintiff alleged that the Congress had authorized DOT and FHWA to disqualify commercial drivers who operate their vehicles under the influence of drugs or alcohol pursuant to Title XII of Pubic Law 99-570 but had not thereby authorized the agency to disqualify drivers who may use drugs but are not impaired at the time of testing. Another plaintiff alleged that the Congress had not granted statutory authority to UMTA to condition receipt of federal mass transit funds upon compliance with UMTA's comprehensive drug-testing regulations. On September 22, 1989, the District Court for the District of Columbia ruled that UMTA did have the authority to issue drug-testing regulations, but petitioners have appealed. Other petitioners alleged that statutory authority had been exceeded because the FRA does not have statutory power to delegate to private railroads the authority to initiate random drug testing.

Petitioners also used the Administrative Procedure Act to challenge DOT's preparation or justification of their regulations by claiming that such actions were arbitrary and capricious or an abuse of discretion. The main argument using this rationale was that the regulations did not enhance public safety in the transportation industry.

Some plaintiffs more specifically challenged DOT's preparation or justification of the regulations as being arbitrary or an abuse of discretion. For example, one plaintiff claimed that the DOT regulations did not meet the Administrative Procedure Act's standards because DOT did not prepare a "Federalism Assessment" as required by Executive Order 12612. Other plaintiffs alleged that DOT had arbitrarily established costs and benefits to justify the program because it did not give a basis for its assumptions for those costs and benefits. Finally, some petitioners asserted that a regulatory flexibility analysis did not explain the types of impact that may occur to small business or alternatives to the regulations that could minimize those impacts.

Regulations Include Improper Categories of Employees

The random-testing aspect of DOT's regulations has also been challenged on the basis that the search covers categories of employees who should not be included in the regulations because they are not in security or safety-sensitive positions. Coverage of improper categories of employees is the second main issue that DOT perceives as the most serious challenge to their regulations.

Status of Pending Lawsuits

DOT has worked with the petitioners of the 21 lawsuits challenging the administrations' rules to get them consolidated so as to constitute only one case per administration. In addition, there is one lawsuit against OST's interim final rule for the drug-testing procedures. Several months of procedural litigation has reduced the number of lawsuits against the administrations, and one remains against OST.

The procedural litigation has also resulted in lessening the number of district courts and appellate circuits that are involved. At one point the 22 cases were distributed among three federal district courts and three appellate circuits. The cases are now before the District Courts for District of Columbia and the Northern District of California and the District of Columbia and Ninth Circuit Courts of Appeals.

DOT's interim final rule on the drug-testing procedures is before the District of Columbia Circuit Court of Appeals. Petitioners in that case challenged issuance of DOT's "interim final" rule under the Administrative Procedure Act because it was issued without notice and opportunity for public comment. DOT's interim final rule, however, provides for comments after issuance; and according to DOT's Office of General Counsel, the D.C. Court of Appeals is holding the case in abeyance pending DOT's consideration of those comments. Cases being argued in the District Court for the District of Columbia involve two Coast Guard cases that were consolidated.

The remaining cases are before either the District Court for the Northern District of California or the Ninth Circuit Court of Appeals. Only the FHWA has a case before both courts. The District Court for the Northern District of California issued a temporary injunction against postaccident and random drug testing of truck drivers under FHWA's program. However, since the regulations do not go into effect until December 21, 1989, that ruling has had no substantive effect yet. In addition, five other FHWA cases have been consolidated before the Ninth Circuit Court of Appeals. DOT's Office of General Counsel told us that it is unclear what

the status of the temporary injunction would be if that case were consolidated with the other five before the court of appeals.

FRA has one case, but since much of FRA's regulations were upheld in the spring by the Supreme Court, DOT's Office of General Counsel is unclear whether petitioners in that case will proceed or not. RSPA requires an administrative review before its regulations can be challenged in federal court. Three cases were filed against RSPA in different circuit courts, but all are now in the Ninth Circuit. However, that court has stayed its proceedings until RSPA and DOT have had an opportunity to resolve the matter administratively.

According to DOT's Office of General Counsel, the parties of six separate lawsuits challenging FAA's rule have consolidated in the Ninth Circuit and have agreed to file one brief. They have limited their challenge to only the constitutionality of random drug testing by conceding the constitutionality of the other required types of testing in view of the Supreme Court's rulings in Skinner v. RLEA and NTEU v. Von Raab. DOT believes that the nonprevailing party will seek further review before the Supreme Court.

Chapter 5

Analysis of Proposed Drug-Testing Legislation

Two bills that could affect DOT's drug-testing programs are before the 101st Congress. These bills would provide DOT with specific statutory authority to require drug and alcohol testing for certain private-sector transportation industry workers.[1] The DOT drug-testing regulations issued by the six administrations are based on each administration's overall statutory authority to regulate safety. However, these two bills do not cover all the administrations covered by DOT's present drug-testing regulations. H.R. 1208 would require, among other things, drug and alcohol testing of certain rail workers and includes a provision requiring mandatory employer-paid rehabilitation of employees who test positive. This bill passed the House on July 31, 1989. S. 561 would require drug and alcohol testing of certain workers in the rail, aviation, and motor carrier industries. This bill was reported to the Senate by the Committee on Commerce, Science and Transportation on August 1, 1989. By amendment, S. 561 became part of the DOT appropriation bill for fiscal year 1990, which passed the Senate on September 27, 1989.

The Senate and House bills are essentially the same as bills proposed in the 100th Congress. However, according to press reports, legislation was not enacted by the Congress partly because the Senate and House conferees could not reach an agreement on the provision relating to rehabilitation of employees testing positive to drug use.

We identified several key differences between one or both of the proposed bills and DOT's drug-testing regulations such as (1) the number of administrations covered, (2) inclusion of alcohol testing in addition to drug testing, (3) types of testing, (4) rehabilitation of workers testing positive to drug use, (5) a pilot testing program to establish a random-testing program for truck drivers, (6) the penalties associated with violations of the program regulations, and (7) reporting requirements on the results of drug testing. Table 5.1 shows a comparison between the key provisions contained in the bills being considered by the 101st Congress and DOT's drug-testing program.

[1] Another bill has been introduced in the House covering the establishment of standards for laboratories engaged in drug testing.

Table 5.1: Comparison of DOT Drug-Testing Regulations With House and Senate Drug-Testing Bills

Element	DOT regulations	H.R. 1208	S. 561
Administrations	FAA, FHWA, FRA, RSPA, UMTA, and USCG	FRA	FRA, FHWA, and FAA
Substances[a]	Five controlled substances	Same five drugs and alcohol	Same five drugs and alcohol
Tests required	Random, postaccident, preemployment, reasonable-cause, return-to-duty/ follow-up, periodic	Same tests	Same tests, except no return-to-duty testing
Employer-paid rehabilitation required	No	Yes	No
Pilot program	No	No	Yes—FHWA, random (4 states; 1 year)
Penalties	FRA[b]	Civil—$1,000-10,000; criminal—up to 3 years in prison	FHWA
Employer reporting			
Annual	FAA, FRA, and UMTA	Yes	No
Cost	No	Yes	No

[a]The postaccident portions of the FRA and USCG programs include alcohol testing.

[b]Other administrations chose not to include penalties in their drug-testing regulations. Instead, they are relying on their existing penalties pursuant to their current statutory authority.

Source: Congressional bills and administrations' drug-testing regulations.

Industry Coverage

The DOT regulations cover more transportation workers than the proposed bills because the regulations include the industries regulated by the six DOT administrations: FAA, FHWA, FRA, RSPA, UMTA, and USCG. On the other hand, the House bill covers only the railroad industry regulated by the FRA while the Senate bill covers the industries regulated by FAA, FHWA, and FRA. The authorizing committees for DOT are split between three committees in the House and one in the Senate. In the House, the Committee on Energy and Commerce is responsible for FRA; the Committee on Public Works and Transportation is responsible for FAA, FHWA, and UMTA; and the Committee on Merchant Marine and Fisheries is responsible for the USCG. RSPA is authorized jointly by the Committee on Public Works and Transportation and the Committee on Energy and Commerce. In the Senate, the Committee on Commerce, Science, and Transportation has jurisdiction over the six DOT administrations with drug-testing regulations.

If the Congress passes legislation that does not include the industries regulated by all six of these DOT administrations, DOT's existing drug-testing regulations would continue to apply with respect to those not statutorily covered. As a result, the situation could develop where different drug-testing rules apply to the administrations depending on whether a particular administration is covered by legislation or the DOT regulations.

Alcohol Testing

The DOT drug-testing regulations do not cover alcohol testing except for the postaccident testing required by the FRA and USCG programs. As part of its rule-making process, the DOT administrations evaluated comments on the inclusion of alcohol testing but decided to exclude such testing. For example, FRA stated in its final regulations that alcohol testing presented additional issues because it is not possible to test a single urine specimen, which is the only type of specimen collected under the regulations, to determine current blood alcohol concentration. Breath testing is the preferred method of detection and evaluation for alcohol abuse. FRA also presented data showing that alcohol abuse may be declining as a problem. For example, FRA stated that alcohol presence was recently less apparent in railroad employees killed on the job in train incidents. FRA decided to pursue the alcohol issue in existing programs with the possibility of reexamining the issue at a later time. The other administrations took similar positions in their regulations.

Both House and Senate bills include alcohol testing along with drug testing. Proponents of these bills believe alcohol abuse is as great a problem as illegal drug abuse and must be dealt with through a testing program.

The issue of alcohol testing received increased attention in the light of the recent Valdez oil spill disaster in Alaska. The DOT Secretary announced at a June 1989 hearing of the Senate Committee on Commerce, Science, and Transportation that he has directed DOT staff to begin drafting regulations requiring commercial vehicle operators to submit to alcohol tests.

Types of Testing

The DOT regulations and the House bill require the same six types of testing—preemployment, periodic, reasonable-cause, postaccident, random, and return-to-duty testing after a prolonged absence. The Senate bill requires the same types of employee drug testing with the exception of return-to-duty testing.

Rehabilitation

Another issue in the drug-testing program involves employee rehabilitation. It was a key issue in the drug-testing bill that was debated during the 100th congress. Although drug-testing bills had passed both the House and Senate, House-Senate conferees, according to press accounts, could not reach agreement on the rehabilitation requirement.

Each DOT administration asked for comments on mandatory rehabilitation in its rule making. The administrations decided to encourage employers to provide rehabilitation when requested by employees but did not require it in their drug-testing regulations. Rather, the DOT administrations decided to allow employers to provide rehabilitation at their discretion. Their rationale was that mandatory rehabilitation was a collective bargaining issue and interfered with the employee/employer relationship. In addition, some comments received on the proposed regulations cited the large cost factor, which would greatly increase the cost to industry of the drug-testing program. Concern also existed about the effect, in particular on small businesses, of the cost of rehabilitating an employee and compensating a replacement employee during this rehabilitation period.

The House bill would require employer-paid rehabilitation for first-time offenders. The sponsors believe this will encourage employees to seek treatment and help society as a whole to deal with the drug and alcohol abuse problem.

Pilot Random-Testing Program

The Senate bill calls for a 1-year pilot program involving random testing of motor carrier employees for both drugs and alcohol in four states and would authorize $5 million to fund this pilot program. It would authorize DOT to consider alternative methodologies for implementing a system of random testing of operators of commercial vehicles. The House bill does not apply to the motor carrier industry.

The DOT administrations' regulations do not call for a pilot program for random testing in the motor carrier industry. The regulations mandate testing throughout the nation.

Penalties

Another difference involves the penalties to be used against employers who violate drug-testing regulations. The Senate bill, which amends FAA's, FRA's, and FHWA's basic enabling authorities to require drug and alcohol testing, is silent with respect to penalties to be applied by the FAA and FRA for employer violations. However, it specifically provides

for penalties for employers who violate certain FHWA testing procedures. The House bill, which covers FRA, establishes civil and criminal penalties for employer violations. As discussed in chapter 3, we are recommending that each DOT administration publish a specific penalty schedule for employers who do not comply with the drug-testing regulations.

Periodic Reporting

The House bill requires the most extensive reporting requirements. It requires an annual report to the Congress by DOT and annual reports to DOT by employers performing drug testing, including test results and costs of testing. The Senate bill requires a report on the pilot random test program for the trucking industry but does not require periodic reporting of overall program costs and results. In the DOT drug-testing programs, FAA, FRA, and UMTA are requiring reports from employers on the results of drug testing; but none of the administrations require reporting on the costs associated with the testing program. As discussed in chapter 3, we believe periodic employer reporting on program costs and drug-testing results is important to effective program implementation and management.

Listing of Original Petitions Filed Against DOT's Industry Drug-Testing Regulations

FAA	Bluestein et al. v. Skinner et al., No. 88-7503 (9th Cir.)
	Linn v. Skinner et al., No. 88-7508 (9th Cir.)
	Albert et al. v. Skinner et al., No. 89-70024 (9th Cir.)
	Independent Union of Flight Attendants v. Skinner et al., No. 89-70138 (9th Cir.)
	Airline Pilots Association et al. v. Skinner et al., No. 89-70139 (9th Cir.)
	Association of Professional Flight Attendants v. Skinner et al., No. 89-70111 (9th Cir.)
FHWA	Oil, Chemical, and Atomic Workers et al. v. Skinner et al., No. C-89-0471-DLJ (N.D. Cal.)
	Owner-Operators Independent Drivers Association of America Inc. et al. v. Skinner, No. C-88-4547 (N.D. Cal.)
	International Brotherhood of Teamsters v. Skinner, No. C-88-4854 (N.D. Cal.)
	Amalgamated Transit Union et al. v. Skinner et al., No. C-89-0081 (N.D. Cal.)
	Railway Labor Executives' Association et al. v. Skinner et al., No. C-89-0298 (N.D. Cal.)
	Railway Labor Executives' Association et al. v. Skinner et al., No. C-89-0436 (N.D. Cal.)
FRA	Railway Labor Executives' Association et al. v. Skinner et al., No. C-88-4824 (N.D. Cal.)
RSPA	International Brotherhood of Electrical Workers, Local 1245, et al. v. Skinner et al., No. 89-70061 (9th Cir.)
	Interstate Natural Gas Association of America (INGAA) v. Skinner, No. 89-1111 (9th Cir.)

	Oil, Chemical, and Atomic Workers v. Skinner et al., No. C-89-0471-DLJ (N.D. Cal.)
UMTA	Amalgamated Transit Union et al. v. Skinner et al., No. 88-3642-LFO (D.D.C.) Transport Workers' Union of America, AFL-CIO, et al. v. Skinner et al., No. 89-0067-LFO (D.D.C.) Railway Labor Executives' Association et al. v. Skinner et al., No. 89-0437 (N.D. Cal.)
USCG	Transportation Institute et al. v. United States Coast Guard, No. 88-3429 (D.D.C.) District 2, Marine Engineers Beneficial Association (MEBA), Associated Maritime Officers, AFL-CIO, et al. v. Yost, No. 89-CV-1519 (TFH) (D.D.C.)
Office of Secretary	DrugScan, Inc. v. Department of Transportation, No. 88-1888 (D.C. Cir.)

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